(2)

CASE NO. 93 - 1039

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

STATE OF COLORADO,

Petitioner

v.

LESLIE BENJAMIN LAFRANKIE

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

On Petition For Writ Of Certiorari to the Colorado Supreme Court

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Supreme Court should deny Petitioner's application for certiorari because in its petition arguing for a modification of the legal standard of "custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), that claim was not pressed or passed on below and thus is not appropriate for review under *Illinois v. Gates*, 462 U.S. 213 (1983)?

2. Whether the United States Supreme Court should deny Petitioner's application for certiorari because there is no conflict among the federal circuit courts or the states as to what is the appropriate legal test for "custody" in triggering the need for an advisement pursuant to *Miranda*.

3. Whether the United States Supreme Court should deny Petitioner's application for certiorari because the district court and the Colorado Supreme Court applied the correct legal standard in suppressing statements made by Respondent to police detectives, and there is competent evidence in the record supporting the district court's findings?

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OPINIONS BELOW

The transcript of the testimony adduced at the hearing on Mr. LaFrankie's motion to suppress is Appendix A.

STATEMENT OF THE FACTS

Leslie Benjamin LaFrankie was suspected of stealing a computer from his employer, High Tech Manufacturing. (Appendix at p.3, l.16.) As part of the investigation, police detectives requested that Mr. LaFrankie be removed from his work area during work hours and be taken to the office of the president of the employer-victim. (App. at p.18, l.19 through p.20., l.13.) Mr. LaFrankie was then interrogated behind closed doors by two police detectives seated next to him. (App. at p.21, l.15

through p.22, l.20.) The interrogation was conducted on the same premises where the crime was committed. Mr. LaFrankie denied having taken the computer and explained how he came into possession of a similar computer that he had at his home. (App. at p.8, l.2.) The detectives told Mr. LaFrankie that he was lying. (App. at p.23, l.17.)

The majority of the interview was conducted in this fashion. For example, Officer Scott told LaFrankie not to worsen his mistake by lying, (App. at p.9, l.14.); that LaFrankie would fail a polygraph test because he was lying, (App. at p.26, l.18.); that Lafrankie had "a big bright sign on [his] forehead that says you made a mistake here;" *LaFrankie, supra*, App. to Pet. for Cert. at C-8, n.8; that LaFrankie's story was too coincidental to be believed, (App. at p.34, l.9.); that LaFrankie looked ; nervous and sweaty -- as if he were lying, (App. at p.29, l.22.); that he was as nervous as a cat on a hot tin roof, (App. at p.25, l.22.); that LaFrankie could be used as a "poster boy for lying (App. at p.26, l.24.);" and that LaFrankie had insufficient funds in his checking account to purchase a computer for $200.00 cash. (App. at p.13, l.9.) Nonetheless, LaFrankie steadfastly maintained his innocence throughout most of the interrogation. (App. at p.23, l.24 through p.24, l.6.)

Additionally, Mr. LaFrankie was effectively told that a polygraph <u>would</u> be conducted, and that he would fail it. (App. at p.29, l.20.) The police communicated to Mr. LaFrankie that he would be treated more leniently by a judge if he confessed.

(App. at p.28, 1.22.) Mr. LaFrankie was told that he had nothing to worry about if he confessed because he was not on probation. (App., at p.30, 1.6 through 14.) Mr. LaFrankie was told that Boulder County is extremely lenient - "the place they sent somebody to college for murdering somebody, okay. Okay." (App. at p.35, 1.21 - p.36, 1.1.) The police officers preyed on Mr. LaFrankie's religious beliefs to get him to confess, telling him, "God will know if he is lying." (App. at p.37. 1.18.)

After about thirty minutes of this type of questioning, Mr. LaFrankie confessed to having stolen the computer. (App. at p.10, L.13.) In the course of the closed-door interview, Mr. LaFrankie was never informed that he was free to leave or that he was not in official custody. (App. at p.23, 1.20.) Neither detective advised Mr. LaFrankie of his *Miranda* rights before or during the interview. (App. at p.7, 1.19.)

Mr. LaFrankie filed a motion to suppress statements and evidence in the trial court. The trial court found the interrogation to be custodial and suppressed Mr. LaFrankie's statement because to the absence of *Miranda* warnings. The prosecution appealed the trial court's findings to the Colorado Supreme Court. The Colorado Supreme Court affirmed the trial court's ruling.

The State filed a Petition for Writ of Certiorari in the United Stated Supreme Court on December 23, 1993. The petition was received by Respondent on the next business day, December 27, 1993. The brief in opposition to this petition is currently due to be filed on January 26, 1994.

SUMMARY OF THE ARGUMENT

Petitioner did not propose a modification of the definition of "custody" for purposes of *Miranda v. Arizona,* 384 U.S. 436 (1966), in the state courts. Petitioner never argued to the lower courts that Colorado improperly examined "custody" with reference to whether "a person has been taken into custody or otherwise deprived of his freedom of action in any significant way," *id.* at 444, rather than whether there is "a formal arrest or restraint on freedom of movement of the degree associated with formal arrest." *California v. Beheler,* 463 U.S. 1121, 1125 (1983)(per curiam). As a result, this issue was never "pressed or passed upon below," *Illinois v. Gates,* 462 U.S. 213, 222 (1983), and consequently this Court should refuse to exercise its jurisdiction.

The Colorado Court correctly applied the objective, "reasonable person" test in evaluating whether Respondent was in "custody" for purposes of *Miranda*. That test conforms with the standard announced by this Court in *Berkemer v. McCarty,* 468 U.S. 420 (1984). The majority of lower federal and state courts also apply the objective standard to the Miranda "custody" determination. Thus, Petitioner's argument that there is a widespread misapplication of *Miranda* is without merit, and the petition for writ of certiorari should be denied.

ARGUMENT

I. THIS COURT SHOULD NOT ACCEPT JURISDICTION BECAUSE PETITIONER'S ARGUMENT CONCERNING THE CORRECT DEFINITION OF CUSTODY FOR MIRANDA PURPOSES WAS NOT PRESSED OR PASSED ON BELOW.

Petitioner did not propose a modification of the *Miranda* rule in the state courts. Knowing full well the status of the law in Colorado with regard to custody determinations, Petitioner nevertheless did not raise its novel interpretation of "restraints of the degree associated with arrest" nor press for its application in any state court proceeding. The record is devoid of any proposal for modification or reinterpretation of the long-standing totality of circumstances test.

This Court's disinclination to pass upon issues for the first time on certiorari is well-settled in the caselaw. *See, e.g., Illinois v. Gates,* 462 U.S. 231 (1983); *Cardinale v. Louisiana,* 394 U.S. 437 (1969). In *Gates,* the respondents had filed a motion to suppress evidence seized pursuant to a warrant in the trial court. Their motion to suppress was granted, and that ruling was affirmed by both the Illinois Appellate Court and the Illinois Supreme Court. The initial issue in the petition for certiorari was the application of the Fourth Amendment to a magistrate's issuance of a search warrant on the basis of a partially corroborated anonymous informant's tip. *Gates,* 462 U.S. at 217. This Court requested that the parties address an additional question; whether the exclusionary rule should be modified in particular situations. *Id.*

This Court declined to decide whether the exclusionary rule should be modified, however, and based its decision on jurisdictional grounds. Because the issue of modification was never "pressed or passed below," it was not properly before the Court. This Court's teaching regarding the jurisdictional issue in *Gates* is instructive in this case as well. In the *Gates* opinion, Justice Rehnquist identified several purposes underlying the "not pressed or passed upon below" rule:

> First, questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind. Exactly the same difficulty exists when the State urges modification of an existing constitutional right or accompanying remedy .... Likewise, due regard for the appropriate relationship of this Court to state courts demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes in existing remedies for unconstitutional actions. Finally, by requiring that the state first argue to the state courts that the ... rule should be modified, we permit a state court, even if it agrees with the state as a matter of federal law, to rest its decision on an adequate and independent state ground.

Id. at 221-22, *citing Cardinale v. Louisiana,* 394 U.S. 437 (1969); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430 (1940)(quotations omitted). The Court further noted that "the routine restatement and application of settled law by an appellate court [does] not satisfy the 'not pressed or passed upon below' rule." *Id.* at 222-23.

All of the considerations explained in *Gates* are present in this case. The district court and the Colorado Supreme Court applied firmly established criteria to determine that the Respondent was in custody and subjected to police interrogation.

The legal test for custody determinations that was applied by the Colorado courts in this case is well-settled in Colorado, the state courts and the federal courts. If Petitioner desired that the Colorado courts apply the novel restriction that it has proposed in its Petition for Writ of Certiorari, then it should have raised that issue in the state courts, not for the first time in its Petition to this Court. The Colorado courts have not had the opportunity to consider this novel restriction and to choose to rest their decisions on adequate and independent state grounds. The Colorado court decisions involved "the routine restatement and application of settled law" and thus Petitioner should fail in seeking jurisdiction in this Court because its claim for modification has not been pressed or passed upon below.

II. THE PERCEIVED CONFLICT BETWEEN THE LAFRANKIE DECISION AND OTHER FEDERAL AND STATE COURT DECISIONS HAS NOT RESULTED IN A WIDESPREAD MISAPPLICATION OF MIRANDA AND THUS DOES NOT WARRANT THE GRANTING OF CERTIORARI BY THIS COURT.

Before addressing the substantive arguments raised by Petitioner, it is useful to have in mind the policy considerations that the *Miranda* case addressed. It is against the background of those policies that any discussion of the application of the principles enunciated in *Miranda* must take place.

The Fifth Amendment embodies one of the basic rights that are enshrined in our Constitution, *Miranda*, 384 U.S. at 442, and

provides, in pertinent part, that "No person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. "[T]he Fifth Amendment privilege ... serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda,* 384 U.S. at 467 (emphasis added). The privilege embodies principles of humanity and civil liberty which were secured in the mother country only after centuries of persecution and struggle. *Withrow v. Williams,* ___ U.S. ___, 113 S. Ct. 1745, 1753 (1993); *Miranda,* 384 U.S. at 442. These precious rights were secured "for ages to come, and ... are designed to approach immortality as nearly as human institutions can approach it." *Id., quoting Cohens v. Virginia,* 6 Wheat. 2634, 387 (1821).

The maxim embodied in the Fifth Amendment had its origin in a protest against "inquisitorial and manifestly unjust methods of interrogating accused persons. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim ... became clothed in this country with the impregnability of a constitutional enactment." *Id. quoting Brown v. Walker,* 161 U.S. 591, 596-97 (1896).

Early in this century, this Court recognized its obligations vis-a-vis the Constitution and the Bill of Rights. "In stating the obligation of the judiciary to apply these

constitutional rights, this Court [acknowledged] ... that [r]ights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction." *Id.* at 443-44, *quoting Weems v. United States,* 217 U.S. 349, 373 (1910).

The *Miranda* court emphasized that it was against the backdrop of these principles that the *Miranda* cases were decided. "This [is] the spirit in which we delineate ... the manner in which the constitutional rights of the individual [can] be enforced against overzealous police practices.[1] It [is] necessary ... to insure that what was proclaimed in the Constitution ha[s] not become but a 'form of words' in the hands of government officials." *Id.* at 444, *citing Silverthorne Lumber Co. v. United States,* 251, U. S. 385, 392 (1920).

These principles reflect that notion that "a system of law enforcement which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system relying on independent investigation. *Withrow v. Williams,* 113 S. Ct. at 1753, *citing Michigan v. Tucker,* 417 U.S. 433, 448 n. 23 (1974) (*quoting Escobedo v. Illinois,* 378 U.S. 478, 488-89 (1964)).

It has long been held that the Fifth Amendment prohibition against self-incrimination privileges a person not to answer official questions put to him in any proceeding, civil or

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1. An extensive review of the "overzealous police practices" that *Miranda* intended to remedy is set forth in the *Miranda* opinion at pages 445-455.

criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. *Minnesota v. Murphy,* 465 U.S. 420, 426 (1984), *citing Lefkowitz v. Turley,* 414 U.S. 70, 77 (1973). This protection is particularly necessary in the context of custodial interrogations because the compulsion to speak to law enforcement officials in an isolated setting may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation and trickery. *Orozco v. Texas,* 394 U.S. 324, 326 (1969), *citing Miranda,* 384 U.S. at 461.

Prior to *Miranda,* the admissibility of an accused's in-custody statements was judged solely by whether they were voluntary within the meaning of the Due Process Clause. *Oregon v. Elstad,* 470 U.S. 298, 304 (1985). In *Miranda,* recognizing that the Fifth Amendment privilege guarantees a person subjected to questioning "the right to remain silent unless he chooses to speak in the unfettered exercise of his own free will," *Miranda* 384 U.S. at 460, *quoting Malloy v. Hogan,* 378 U.S. 1, 8 (1964), the Court addressed the problem of how the privilege could be protected from the coercive pressures that can be brought to bear upon a suspect in the context of custodial interrogation. The Court thus recognized that custodial interrogations, by their very nature, generate inherently "compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," *Moran v. Burbine,* 475 U.S. 412, 420 (1986), *quoting Miranda,* 384 U.S. at 467; *accord, Illinois v. Perkins,* ___ U.S. ___, 110 S.

Ct. 2394, 2397 (1990); *Murphy,* 465 U.S. at 430, "and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible coercion." *Burbine,* 475 U.S. at 426, *citing New York v. Quarles,* 467 U.S. 649, 656 (1984).

The coercion inherent in custodial interrogation derives from a number of circumstances common to questioning by law enforcement officials: isolation, *Miranda,* 384 U.S. at 445, 449 (the principal psychological factor contributing to a successful interrogation is privacy); unfamiliar surroundings, *id.* at 449, 450; lapse of time, *id.* at 451; lack of acquaintance with one's questioners, *Murphy,* 465 U.S. at 433; the incriminatory nature of the disclosures sought, *id.* at 430, *citing Garner v. United States,* 424 U.S., U.S. 648, 657 (1976); the fear of reprisal for remaining silent, *Perkins,* 110 S. Ct. at 2397; the hope of more lenient treatment should a confession be forthcoming, *id.*; insinuations that the interrogation will continue until a confession is obtained, *Murphy,* 420 U.S. at 433, *citing Miranda,* 384 U.S. at 468; repeated or successive interrogations, sometimes by police acting out friendly or unfriendly roles, *Orozco,* 394 U.S. at 328 (White, J. dissenting); the appearance that the officers control the suspect's fate, *Perkins,* 110 S. Ct. at 2397; the message that the suspect has no choice but to subjugate himself to the will of the examiner, *Murphy,* 465 U.S. at 433, *quoting Miranda,* 384 U.S. at 457; and the use of ploys such as cajolery and trickery, *Orozco,* 394 U.S. at 328 (White,

J. dissenting).

The "salient features" that the *Miranda* court sought to address may be summarized as the "incommunicado interrogation of individuals in a police-dominated atmosphere." *Miranda,* 384 U.S. at 445. To dissipate the overbearing compulsion inherent in custodial interrogation, the *Miranda* court required the exclusion of incriminating statements obtained during custodial interrogation unless, prior to any questioning, the person was warned that he has the right to remain silent, that any statement he does make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed. *Miranda* at 444. The *Miranda* court thus presumed that interrogation in certain custodial circumstances is inherently coercive, *Elstad,* 470 U.S. at 305, *citing Quarles,* 467 U.S. at 654 (emphasis added), and attempted to safeguard against that inherent compulsion by giving the defendant the power to exert some control over the course of the interrogation. *Burbine,* 475 U.S. at 411 (emphasis in original).

The *Miranda* opinion iterated and reiterated the absolute necessity for officers interrogating people in custody to give the described warnings. *Orozco,* 394 U.S. at 326. One of the principal advantages of the doctrine that suspects must be given warnings before being interrogated is the clarity of that rule. *Berkemer v. McCarty,* 468 U.S. 420, 430 (1984). Requiring *Miranda* warnings before custodial interrogation thus provides practical reinforcement for the Fifth Amendment privilege. *Elstad,* 470 U.S. at 305, *citing Quarles,* 467 U.S. at 654.

Failure to administer *Miranda* warnings creates a presumption of compulsion. *Id.* at 307. While failure of the police to administer *Miranda* warnings does not mean that the statements received have actually been coerced, it does mean that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. *Id.* at 310 (emphasis added).

The policies underlying the *Miranda* decision have not dissipated over time. In the years since the decision in *Miranda,* this Court has frequently reaffirmed the central principle established by that case: "*Miranda* forbids coercion." *Perkins,* 110 S. Ct at 2397. The purposes of the safeguards initially prescribed by *Miranda* and still in full force today can be summarized as follows: to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the inherently compelling pressures generated by the custodial setting itself, which work to undermine the individual's will to resist, and, as much as possible, to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary. *Berkemer v. McCarty,* 468 U.S. at 433.

A. The Colorado Court's Definition of "Custody" for Miranda Purposes is the Same or Equivalent to the Definition Applied by other Federal and State Courts.

1. The United States Supreme Court does not adhere to a rigid definition of custody.

In *Miranda*, this Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. The definition chosen created an elastic type of custody, David M. Nissman, et al., *Law of Confessions* §4.3 at 85 (1985), one that Petitioner now seeks to unduly contract. Since then this Court has reiterated this definition in cases construing the *Miranda* decision. *Bradley v. Ohio*, 110 S. Ct. 3258 (1990)(cert. denied)(Marshall, J., dissenting); *Maine v. Thibodeau*, 475 U.S. 1144, 1146 (1986)(cert. denied)(Burger, J., dissenting); *Berkemer v. McCarty*, 468 U.S. 420, 435 (1984); *California v. Beheler*, 463 U.S. 1121, 1123 (1983)(per curiam); *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980); *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977)(per curiam); *Beckwith v. United States*, 425 U.S. 341, at n.6 (1976); *Orozco v. Texas*, 394 U.S. 324, 327 (1969); *Mathis v. United States*, 391 U.S. 1, 5 (1968). *See Oregon v. Elstad*, 470 U.S. 298, 309 (1985).

Petitioner makes its case for review by this Court on the premise that both the trial court and the Colorado Supreme Court interpreted *Miranda* too broadly in this case, and that state and federal courts around the nation have given "talismanic power"

to the phrase "otherwise deprived of his freedom of action in any significant way" for determinations of custody. (Pet. for Cert. at 9-12.) Petitioner cites to language in *Berkemer v. McCarty,* 468 U.S. 420 (1984); *Minnesota v. Murphy,* 465 U.S. 420 (1984); and *Beheler v. California,* 463 U.S. 1121 (1983), in support of the novel proposition that there can be custody only in situations where there is "formal arrest or restraints of the degree associated with arrest." What Petitioner desires is that "talismanic power" be accorded to the phrase "restraints of the degree associated with arrest," and for that language to modify, or more probably replace, the long-standing reasonable person test[2] by preventing the consideration by lower courts of the myriad factual contexts in which a custodial interrogation can take place.

Petitioner misapprehends the nature of this Court's writings in the progeny spawned by *Miranda*. The first significant decision from this Court following *Miranda* was *Mathis v. United States,* 391 U.S 1 (1968). Mathis was incarcerated in a Florida prison on an unrelated charge when an IRS agent questioned him briefly pursuant to a routine tax investigation. *Id.* at 2. Once Mathis incriminated himself, the government converted the investigation into a tax-fraud prosecution. *Id.* at 3. This Court found that *Miranda* warnings should have been administered on the grounds that the *Miranda* opinion in no way limited its application to persons who were in

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2. *See* discussion *infra* part II.B.

custody for the particular case under investigation. *Id.* at 4-5.

One year later, the Court was presented with its first opportunity to address the application of *Miranda* in a setting that, unlike a police station or a prison, is not inherently coercive in nature. In *Orozco v. Texas,* 394 U.S. at 324 (1969), this Court held that the questioning of a suspect under arrest in the confines of his boardinghouse room was the type of circumstance that was within the scope of *Miranda. Id.* at 326-27.

The reach of *Miranda* next arose in *Beckwith v. United States,* 425 U.S., at 341 (1976). *Beckwith* bears some relationship to both *Mathis* and *Orozco* in that IRS agents interrogated a suspect in a private home, *Beckwith,* 425 U.S. at 342; the Court, however, held that *Miranda* warnings were not required. *Id.* There are numerous distinctions, however, that support the Court's ruling. Unlike Mathis, who answered questions in a prison cell, Beckwith spoke with agents from the home of a friend for whom he was house-sitting. *Id.* at 342. Whereas Orozco was rousted from bed at 8:00 a.m. by four officers who forcefully entered his room, *Orozco,* 394 U.S. at 325, Beckwith faced police at a more reasonable hour and in a less volatile setting. *Beckwith,* 425, U.S. at 342. He also received a nearly complete panoply of warnings, *id.* at 348-49 (Marshall, J., concurring), that were deficient only in that they failed to advise Beckwith, who held a white collar job, of an indigent's right to appointed counsel. *Id.*

One year after *Beckwith,* the Court decided *Oregon v.*

Mathiason, 429 U.S. 492 (1977)(per curiam). *Mathiason* was a watered-down version of a station house interrogation. There, the police were investigating an unsolved theft when they ran across Mathiason - a parolee and friend of the complainant's son. After an officer left his card at Mathiason's apartment, Mathiason returned the call and arranged to meet the officer at the station house, only two blocks away. *Id.* at 423. Police told Mathiason he was not under arrest. *Id.* Early in the half-hour interview, Mathiason confessed after being told, falsely, that his fingerprints had been found at the scene of the crime. *Id.* In holding that the confession was admissible, the Court found that *Miranda* warnings "are required only when there has been such a restriction on a person's freedom as to render him 'in custody.'" *Id.* at 495.

The case of *California v. Beheler,* 463 U.S. at 1121 (1983)(per curiam), was the next significant decision in this area, coming seventeen years after *Miranda.* Beheler called the police to report that a woman he knew from a drug transaction had been fatally shot, and that his confederates had buried the murder weapon in Beheler's backyard. *Beheler* at 1122. After a consent to search uncovered the weapon, Beheler agreed to the officer's suggestion that he accompany him to the station house for questioning. *Id.* Police advised him that he was not under arrest, then interviewed him for half an hour and obtained a confession. A few days later, police arrested and warned Beheler, who waived his *Miranda* rights and again confessed, vowing that his prior confession was voluntary. *Id.*

In the *Beheler* case, the Court commenced its legal analysis by stating: "We held in *Miranda* that '[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Beheler,* at 1123, *quoting Miranda,* 384 U.S. at 444. Only later in the opinion did the court suggest, in a single sentence of arguable dictum,[3] the language that Petitioner now propounds as "talismanic": "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Beheler,* at 1125, *citing Mathiason* at 495.

In *Minnesota v. Murphy,* 465, U.S. at 420 (1984), the Court's next pronouncement in the area of custodial interrogation, Mr. Murphy's probation officer, aware that he had admitted to a rape and murder to a treatment provider, wrote to Murphy and asked him to contact her. *Id.* at 423. Upon receiving the letter, Murphy made an appointment to meet with his probation officer at her office. *Id.* at 423. Conditions of probation previously imposed by the court required him to report to his probation officer as directed, and to be truthful with the probation officer in all matters. *Id.* at 422. At their meeting the probation officer confronted Murphy with the information she had received from his counselor, and Murphy

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3. Richard A. Williamson, *The Virtues (and Limits) of Shared Values: The Fourth Amendment and* Miranda's *Concept of Custody,* 1993 U. Ill. L.R. 379, 380 n. 11, 392 (1993)

confessed that he had committed the rape and murder. *Id.* at 423-424. The Court held that the probationer was not in custody for *Miranda* purposes. Although the case does refer to that language in *Beheler* which has taken on "talismanic" effect for Petitioner, the comparatively familiar, nonrestrictive nature of the encounter is certainly a less-than-significant deprivation of freedom. *See* Daniel Yeager, *Rethinking Custodial Interrogation,* 28 Am. Crim. L. Rev. 1, 17 n. 89 (1991).

The facts of these latter four cases are a far cry from the shared "salient features" of the cases that comprised the *Miranda* decision. There is no reason why a non-coercive station house meeting should automatically yield inadmissible evidence based solely on its locale. *Id.* at 15. *Miranda* does not require the exclusion of statements obtained in a presumptively coercive setting under arguably uncoercive circumstances. *Id.* Nor does it mandate the suppression of uncoerced statements from a probationer.

It is clear in these last two cases that, in utilizing the language which has become "talismanic" for Petitioner, this Court was simply trying to restate, without being repetitive, what it meant by "otherwise deprived of his freedom of action in any significant way." There is nothing in the Court's brief opinion in *Beheler* to suggest that it intended to replace "otherwise deprived of his freedom of action in any significant way" with "restraint on freedom of movement of the degree associated with arrest."[4] To the extent that this Court has

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4. It is unlikely that this Court would choose to modify some of the most

repeated the "restraint" language first set forth in *Beheler* in its subsequent opinions, it does so only in an effort to offer parallels to the *Miranda* definition of custody, which itself is frequently reiterated in those same opinions. *E.g., Bradley v. Ohio,* 110 S. Ct. at 3259 (cert. denied)(Marshall, J., dissenting); *Berkemer,* 425 U.S. at 435, 440; *New York v. Quarles,* 467 U.S. 649, 555, 662 (O'Connor, J., concurring and dissenting)(1984); *Beheler,* 463 U.S. at 1123, 1125 (1983).

Petitioner also relies on this Court's pronouncements in *Berkemer* to support its position that "custody" for *Miranda* purposes requires either formal arrest or "a restraint on freedom of movement of the degree associated with arrest." (Pet. for Cert. at 7-8.) However, the holding of the Court in that case was that persons temporarily detained pursuant to routine traffic stops are presumptively not in custody for purposes of *Miranda*.[5] The Court did not purport to re-address *Miranda's* definition of custody, but only to determine whether a particular category of Fourth Amendment seizures constitute per se a significant deprivation of a person's freedom of action, thereby triggering the need for *Miranda* warnings.

Petitioner cites *Berkemer* out of its factual context in

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crucial language of what is arguably its most significant decision in the realm of criminal procedure in a per curiam opinion, without receiving briefs or arguments on the merits. *See Beheler* at 1127 (Stevens, J., dissenting.)

5. The Court also indicated that if a motorist detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*. *Berkemer,* 468 U.S. at 440.

proposing the modification of the *Miranda* rule. In *Berkemer v. McCarty,* 468 U.S. 420 (1984), this Court explicitly stated its purposes: to resolve confusion "regarding the applicability of our ruling in *Miranda* to interrogations involving minor offenses and to questioning of motorists detained pursuant to traffic stops." *Id.* at 426-27. The case involved a traffic stop where the defendant claimed that his responses to roadside questioning should have been suppressed because he was subjected to custodial interrogation and not advised of his *Miranda* rights. This Court held that, in general, a typical traffic stop and detention would not trigger the need for a *Miranda* advisement because "[f]irst, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief ... [and] [s]econd, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police .... [T]he atmosphere surrounding an ordinary traffic stop is substantially less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself ...." *Id.* at 437-39. This Court renewed its commitment to *Miranda,* and simply limited its application in factual circumstances like those found in *Berkemer*: "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Id.* at 437.

Thus, the holding of *Berkemer* is somewhat narrow and limited to its facts: it does not, contrary to what Petitioner suggests, supply critical analysis to that necessary for the

facts in this case. In this case, circumstances are present that go to the heart of this Court's holding in *Miranda*. Mr. LaFrankie the Respondent, was subjected to over thirty minutes of browbeating and interrogation in a totally incommunicado, police-dominated atmosphere; it is precisely this context in which *Miranda* was meant to apply. *See Miranda,* 384 U.S. at 445-58.

2. The Colorado Court's definition of custody is consistent with that articulated by this Court.

The Colorado courts have consistently cited the original language of the *Miranda* decision in defining custody for purposes of the *Miranda* warnings. Those warnings are required when a person is subjected to police interrogation after having been "taken into custody or otherwise deprived of his freedom of action in any significant way." *People v. Parada,* 533 P.2d 1121 (Colo. 1975), *quoting Miranda,* U.S. 348 at 444. *Accord People v. Hamilton,* 831 P.2d 1326, 1330 (Colo. 1992); *People v. Probasco,* 795 P.2d 1330, 1332 Colo. 1990), *cert. denied,* 498 U.S. 999 (1990); *People v. Lupy Trujillo,* 785 P.2d 1290, 1293 (Colo. 1990); *People v. Julian Trujillo,* 784 P.2d 788, 791 (Colo. 1990); *People v. Viduya,* 703 P.2d 1281, 1286 (Colo. 1985), *People v. Thiret,* 685 P.2d 193, 203 (Colo. 1984; *People v. Johnson,* 671 P.2d 958, 961 (Colo. 1983).

Colorado, like the United States Supreme Court, recognizes that custody encompasses more than formal arrest situations.[6]

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6. *E.g., Pennsylvania v. Bruder,* 488 U.S. 9 (1988) (*Berkemer* did not announce an absolute rule for all motorist detentions ... lower courts must be vigilant that police do not delay formally arresting detained motorists

People v. Thomas, 839 P.2d 1174, 1179 (Colo. 1992). As a result, custody includes, but is not limited to, the situation in which the defendant is actually placed under arrest. *Probasco,* 795 P.2d at 1332. "A person obviously is 'in custody' when that person has been subjected to the constraints associated with a formal arrest." *Thomas,* 839 P.2d at 1178, *quoting Julian Trujillo,* 784 P.2d 788, 791 (Colo. 1990). The *Miranda* requirements, however, are not limited to formal arrests, but also include police interrogations conducted under circumstances where the person interrogated has been deprived of his freedom of action in any significant way, *People v. Haury,* 859 P.2d 889, 893 (Colo. 1993); *Hamilton,* 831 P.2d at 1330; *Julian Trujillo,* 784 P.2d at 791 , by the attendant circumstances. *People v. Algien,* 501 P.2d 468, 471 (Colo. 1972). "[I]n the absence of actual arrest, something must be said or done by the authorities, whether in their manner of approach or in the tone or extent of their questioning, which indicates that they would not have heeded a request to depart or to allow the suspect to do so." *Parada,* 533 P.2d at 1123, *quoting United States v. Hall,* 421 F.2d 540, 545 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970).

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and subjecting then to sustained and intimidating interrogation at the scene of their initial detention); *Berkemer,* 468 U.S. at 440 (if a motorist detained pursuant to a traffic stop is subjected to treatment that renders him "in custody," he will be entitled to the protections prescribed by *Miranda*); *Beheler,* 463 U.S. at 1125 (to determine whether a suspect is in custody for purposes of *Miranda,* the inquiry is whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest); *Mathiason,* 429 U.S. at 495 (*Miranda* warnings are required where there has been such a restriction on a person's freedom as to render him "in custody").

Petitioner argues that the Colorado Court ignored the test for custody articulated by this Court in *Beheler* and *Berkemer* in deciding this and other cases. (Pet. for Cert. at 8.) To the contrary, Colorado has continued to faithfully adhere to the language of *Miranda* which definitively states the test to be applied, rather than deciding cases by reference to subsequent language which is merely a restatement of the original definition. Further, the Colorado Court's fidelity to the original language of the *Miranda* case has not, as Petitioner argues, resulted in an expansion of the situations in which compliance with *Miranda* is required. (Pet. for Cert. at 10.)

Additionally, there is a serious omission in Petitioner's brief which undermines Petitioner's arguments in this regard. Petitioner has ignored of the fact that this Court announced in *Berkemer* that the relevant inquiry for determining whether a suspect was "in custody" is "how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 442. Moreover, Petitioner fails to inform this Court that the Colorado Court, in this case and its predecessors, has diligently and repeatedly applied this test in analyzing whether a particular situation amounted to "custody" for *Miranda* purposes. *People v. LaFrankie*, 858 P.2d 702, (Colo. 1993); *Haury*, 859 P.2d at 893; *People in the Interest of J.C.*, 844 P.2d 1185, 1189 (Colo. 1993); *Thomas*, 839 P.2d at 1178; *Hamilton*, 831 P.2d at 1330; *People v. Gennings*, 808 P.2d 839, 845 (Colo. 1991); *Probasco*, 795 P.2d at 1334; *People v. Horn*, 790 P.2d 816, 818 (Colo. 1990); *Lupy Trujillo*, 785 P.2d at 1293;

Julian Trujillo, 784 P.2d at 791; *People v. Cleburn*, 782 P.2d 784, 786 (Colo. 1989), *cert. denied*, 495 U.S. 923 (1990); *People v. Milhollin*, 751 P.2d 43, 49 (Colo. 1988); *People v. Sandoval*, 736 P.2d 1201, 1203 (Colo. 1987); *People v. Harper*, 726 P.2d 1129, 1131 (Colo. 1986); *People v. Wallace*, 724 P.2d 670, 673 (Colo. 1986); *People v. Archuleta*, 719 P.2d 1091, 1092 (Colo. 1986); *Viduya*, 703 P.2d at 1286; *People v. Black*, 698 P.2d 766, 768 (Colo. 1985); *Thiret*, 685 P.2d at 203; *Johnson*, 671 P.2d at 961; *Parada*, 533 P.2d at 1123; *Algien*, 501 P.2d at 471. A more complete discussion of this test, *infra* Part II.B.2., will make it apparent that the Colorado Court has a long and steady history of complying with the spirit of *Miranda* and its progeny.

3. Other Federal Courts rely on definitions of custody that are functionally identical to the Colorado Court's definition.

Lower courts that have addressed the "custody" issue in the years since *Miranda* fall into three general categories. Some courts, like Colorado, have continued to rely on the definition for custody originally set forth in the *Miranda* opinion. These courts evaluate whether a suspect is "in custody or otherwise deprived of his freedom of action in any significant way." *E.g., United States v. Bezold*, 760 F.2d 999 (9th Cir. 1985), *cert. denied* 474 U.S. 1063 (1986); *McCown v. Callahan*, 726 F.2d 1 (1st Cir. 1984), *cert. denied*, 469 U.S. 839 (1984). (See also Pet. for Cert. at 11-12.) A second group examines whether there has been a "restraint on freedom of movement of the degree associated with formal arrest." *E.g., United States v. Bengivenga*, 845 F.2d 593, (5th Cir. 1988), *cert. denied*, 488

U.S. 294 (1988). (See also Pet. for Cert. at 10 n. 3.) This is an obvious reference to the language of *Beheler*. A third group of courts, eschewing any of the formalistic language of this Court's opinions, asks simply whether the individual being questioned would not be free to leave. *E.g., United States v. Long*, 866 F.2d 402 (11th Cir. 1989).

These lower courts are simply articulating parallel definitions of "custody," and there is nothing to indicate that application of the law to the facts in these cases has resulted in rulings that are inconsistent with the principles underlying *Miranda*. Surely this Court would have seized the opportunity to address this issue before now if misapplication of *Miranda* and its progeny was resulting in a "widespread" miscarriage of justice. Moreover, almost all lower courts apply an objective test[7] to determine whether an individual was in custody for *Miranda* purposes. The obvious conclusion to be drawn is twofold: first, the phraseology of the definition of custody, within certain bounds, is largely irrelevant since the lower courts' decisions demonstrate continuing fidelity to the principles of *Miranda* and its progeny; and second, it may well be more important to a correct resolution that courts apply the objective test than that they state the definition of custody in precisely the same way.

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7. *See infra* part II.B.3.

B. Colorado Like Most Federal and State Courts, Applies the Objective Test to Determine "Custody" for Purposes of Miranda.

1. The United States Supreme Court evaluates "custody" under the "reasonable person" standard.

Although the *Miranda* court defined what it meant by custodial interrogation, it set forth no specific test or standard to employ in applying that definition. Implicit in *Miranda* and its early offspring, however, is the notion that courts must make the determination on a case-by-case basis.[8] That notion first became explicit in *Beheler,* where the Court stated that "the circumstances of each case must certainly influence a determination of whether a suspect is 'in custody.'" *Beheler,* 463 U.S. at 1125.

This Court first announced the standard to be applied in determining whether a suspect was in custody for purposes of *Miranda* warnings in *Berkemer v. McCarty,* 468 U.S. 420 (1984). There, the Court held that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Id.* at 442. In a footnote, the Court stated its reasons for adopting this approach: "An objective, reasonable man test is appropriate because, unlike a subjective test, it is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question." *Id.* , n.35,

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8. See discussion supra part II. A., pp. 13-20.

quoting People v. P., 233 N.E.2d 255, 260 (N.Y. 1967). That the objective test is the standard favored by this Court was only recently reaffirmed in its decision in *Illinois v. Perkins*, 110 S. Ct. 2394 (1990): "Coercion is determined from the perspective of the suspect." *Id.*, at 2397, *citing Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), *and Berkemer*, 468 U.S. at 442.

2. The Colorado Court evaluates "custody" under the "reasonable person" standard.

Like the United States Supreme Court, Colorado has held that "the determination of when custody has been imposed turns on the objective assessment of whether a reasonable person in the suspect's position would consider oneself deprived of his or her freedom of action in any significant way," *e.g., People in the Interest of J.C.*, 844 P.2d at 1189, "during a police interrogation in which the suspect was exposed to the risk of self-incrimination." *E.g., Julian Trujillo*, 784 P.2d at 791.[9]

Under the objective standard, neither the interrogating officer's subjective state of mind nor the suspect's mental state is conclusive on the issue of whether a reasonable person in that situation would have considered the interrogation to be

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9. The Colorado Supreme Court has restated this test in two other ways: (1) "[I]n determining whether a person is in custody, a court must consider whether a reasonable person in the suspect's position would consider himself significantly deprived of his liberty," Archuleta, *719 P.2d at 1092;* citing Black, *688 P.2d at 766;* Thiret, *685 P.2d at 193;* Johnson, *671 P.2d at 958, and (2) "The question of custody turns on an objective assessment of whether a reasonable person in the suspect's position would believe himself to be deprived of his freedom of action to the degree associated with formal arrest,"* Wallace, *724 P.2d at 673,* citing Viduya, *703 P.2d at 1286,* Black, *698 P.2d at 768;* Johnson, *671 P.2d at 961.*

custodial. *Hamilton,* 831 P.2d at 1330, *citing Lupy Trujillo,* 785 P.2d at 1293, *Cleburn,* 782 P.2d at 786. *Accord People in the Interest of J.C.,* 844 P.2d at 1190; *Black,* 1698 P.2d at 786.[10] Like the United States Supreme Court, Colorado has determined that the reasonable person standard is the controlling test because, unlike a subjective test, it "is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncrasies of every person whom they question." *Lupy Trujillo,* 785 P.2d at 1293, *quoting Berkemer,* 468 U.S. at 442 n.35 (*quoting People. v. P.,* 233 N.E.2d at 260; *Hamilton,* 831 P.2d at 1330; *Gennings,* 808 P.2d at 845.

"The issue of custodial interrogation is essentially a factual question that requires a trial court to consider the totality of circumstances surrounding the suspect's encounter with the police, then to assess the credibility of witnesses and to weigh their testimony, and finally to apply the correct legal standard to the facts as found by the court." *Hamilton,* 831 P.2d at 1331; *accord Haury,* 859 P.2d at 893, *citing Horn,* 790 P.2d at 818; *Johnson,* 671 P.2d at 962. While an inquiry into

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10. Cf. Harper, 726 P.2d at 1131 *quoting People v. Black,* 698 P.2d at 768, (testimony by a police officer that he would not have allowed the defendant to leave the scene of the accident has no bearing on the custody issue).

However, an officer's subjective intent is relevant in applying the reasonable person standard if the officer in any way communicated his intent to the suspect. *Cf. People v. Black,* 698 P.2d 766 (Colo. 1984)(police officer's subjective state of mind has no bearing on the custody issue where the officer does not communicate his intentions to the suspect); *accord People v. Harper,* 726 P.2d 1129 (Colo. 1986).

the totality of the circumstances surrounding the interrogation will be open-ended, the more prominent factors for consideration include the following:

> the time, place[11] and purpose of the encounter; the persons present during the interrogation; the words spoken by the officer to the defendant; the officer's tone of voice and general demeanor; the length and mood of the interrogation; whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation; the officer's response to any questions asked by the defendant; whether directions were given to the defendant during the interrogation; and the defendant's verbal or nonverbal response to such directions.

Julian Trujillo, 784 P.2d at 791, *quoting Thiret*, 685 P.2d at 203; *Accord Haury*, 859 P.2d at 893; *People in the Interest of J.C.*, 844 P.2d at 1189; *Probasco*, 795 P.2d at 1332; *Horn*, 790 P.2d at 818; *Lupy Trujillo*, 785 P.2d at 1292; *Cleburn*, 782 P.2d

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11. One of the factors set forth above has been the subject of more than the usual amount of discussion - the location of the interrogation. The place alone is not conclusive of whether questioning has occurred in a custodial setting. *Milhollin*, 751 P.2d at 50. Custodial interrogation requiring the giving of *Miranda* warnings does not necessarily refer to police station interrogation. *Id.*, *Johnson*, 671 P.2d at 961; *Parada*, 533 P.2d at 1122. Conversely, the fact that an interview takes place at a police station is not determinative of the custody issue. *Horn*, 790 P.2d at 818. Not all station house interrogations rise to the level of custodial interrogation. *Johnson*, 671 P.2d at 961. By the same token, however, the initial voluntariness of a person's presence at the station house does not preclude the determination that his presence thereafter is custodial in nature. *Horn*, 790 P.2d at 818; *Algien*, 501 P.2d at 470.

These decisions parallel this Court's decisions dealing with the location of the interrogation. The following cases found a non-stationhouse setting to be "custodial": *E.g.*, *Rhode Island v Innis*, 446 U.S. 291 (1980)(police car); *Orozco v. Texas*, 394 U.S. 324 (1969)(defendant's bedroom); *Mathis v. United States*, 391 U.S. 1 (1968)(prison cell during defendant sentence for an unrelated offense). On the other hand, this Court has recognized that not all stationhouse interrogations are "custodial." *California v. Beheler*, 463 U.S. 1121 (1983)(stationhouse interrogation was not a "custodial interrogation" which required *Miranda* advisement); *Oregon v. Mathiason*, 429 U.S. 492 (1977)(same).

at 786; *Sandoval*, 736 P.2d at 1203; *Wallace*, 724 P.2d at 723; *Black*, 698 P.2d at 768. *See also Milhollin*, 751 P.2d at 49-50; *Harper*, 726 P.2d at 1131; *Johnson*, 671 P.2d at 962; *People v. Rodriquez*, 645 P.2d 857, 860 (Colo. 1982).

Thus, a review of the pertinent Colorado law illustrates that Colorado is closely in step with this Court in its development of the standard to be applied in assessing whether "custody" exists. Although this Court has not explicitly held that the totality of circumstances surrounding the suspect's encounter with the police should be examined to determine whether the interrogation was "custodial," this Court has indicated in the past that "the circumstances of each case must certainly influence [such] a determination ...." *Beheler*, 463 U.S. at 1125. Additionally, this Court has engaged in a de facto "totality of circumstances" analysis in deciding "custody" issues. *See supra* note 8. Even in this regard, then, Colorado's mode of analysis is consistent with, if more explicit than, that applied by this Court.

3. The majority of lower courts evaluate "custody" under the "reasonable person" standard.

A survey of the lower courts indicates that the majority of federal appellate courts also employ an objective, reasonable person test to determine whether custody has attached for Fifth Amendment purposes. *See Fisher v. Scafati*, 439 F.2d 307 (1st Cir.), *cert. denied*, 403 U.S. 939 (1971); *see United States v. Hall*, 421 F.2d 540 2nd Cir. 1969), *cert. denied*, 397 U.S. 990 (1970); *see Yount v. Patton*, 710 F.2d 956 (3d Cir. 1983), *rev'd*

on other grounds, 467 U.S. 1025 (1984); *see Steigler v. Anderson*, 496 F.2d 793 (3d Cir. 1974), *cert. denied*, 419 U.S. 1002 (1974); *Davis v. Allsbrooks*, 778 F.2d 168 (4th Cir. 1985); *see Moore v. Ballone*, 658 F.2d 218 (4th Cir. 1981); *United States v. Harrell*, 894 F.2d 120 (5th Cir. 1990), *cert. denied*, 498 U.S. 834 (1990); *United States v. Corral-Franco*, 848 F.2d 536 (5th Cir. 1988); *United States v. Bengivenga*, 845 F.2d 593 (5th Cir. 1988), *cert. denied*, 488 U.S. 294 (1988); *United States v. Macklin*, 900 F.2d 948 (6th Cir. 1990), *cert. denied*, 498 U.S. 840 (1990); *United States v. Lennick*, 917 F.2d 974 (7th Cir. 1990); *United States v. Griffin*, 922 F.2d 1343 (8th Cir. 1990); *United States v. Boucher*, 909 F.2d 1170 (8th Cir. 1990), *cert. denied*, 498 U.S. 942 (1990); *United States v. Carter*, 884 F.2d 368 (8th Cir. 1989); *see United States v. Jones*, 630 F.2d 613 (8th Cir. 1980); *United States v. Manasen*, 909 F.2d 1357 (9th Cir. 1990); *United States v. Brady*, 819 F.2d 884 (9th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988); *United States v. Wauneka*, 770 F.2d 1434 (9th Cir. 1985); *United States v. Gillyard*, 726 F.2d 1426 (9th Cir. 1984); *United States v. Crisco*, 725 F.2d 1228 (9th Cir. 1984), *cert. denied*, 466 U.S. 977 (1984); *United States v. Bautista*, 684 F.2d 1286 (9th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983); *United States v. Leyva*, 659 F.2d 118 (9th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982); *United States v. Kennedy*, 573 F.2d 657 (9th Cir. 1978); *United States v. Irion*, 482 F.2d 1240 (9th Cir. 1973), *cert. denied*, 414 U.S. 1026 (1973); *see Lowe v. United States*, 407 F.2d 1391 (9th Cir. 1969); *United States v. Pena*, 920 F.2d 1509

(10th Cir. 1990), *cert. denied,* ___ U.S. ____, 111 S.Ct. 2802 (1991); *Cordoba v. Hanrahan,* 910 F.2d 691 (10th Cir. 1990), *cert. denied,* 498 U.S. 1014 (1990); *United States v. Torkington,* 874 F.2d 1441 (11th Cir. 1989); *United States v. Long,* 866 F.2d 402 (11th Cir. 1989); *United States v. Phillips,* 812 F.2d 1355 (11th Cir. 1987). *See generally* David M. Nissman, et al., *Law of Confessions* §4:10 Table 4-1, at 100 (1985); J.F. Ghent, Annotation: *What Constitutes "Custodial Interrogation Within Rule of* Miranda v. Arizona *Requiring That Suspect Be Informed of His Federal Constitutional Rights Before Custodial Interrogation,* 31 A.L.R.3d 565, § 6 (1970); *16th Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1985-1986,* 75 Geo. L.J. 713, 827-828 (1987).

Many states besides Colorado also apply the objective test. *E.g., State v. Morse,* 617 P.2d 1141 (Ariz. 1980); *People v. Arnold,* 426 P.2d 515 (Cal. 1967), *overruled on other grounds by Walker v. People,* 763 P.2d 852 (1988); *People v. Lucas,* 548 N.E.2d 1003 (Ill. 1989); *State v. Fritschen,* 802 P.2d 558 (Kan. 1990); *State v. Gardner,* 509 A.2d 1160 (Me. 1986); *Myers v. State,* 240 A.2d 288 (Md. App. 1968); *People v. Lumley,* 398 N.W.2d 474 (Mich. App. 1986); *see State v. Palm,* 299 N.W. 2d 740 (Minn. 1980); *see Roberts v. State,* 301 So. 2d 859 (Miss. 1974); *People v. P.,* 233 N.E.2d 255 (N.Y. 1967); *State v. Torres,* 393 S.E.2d 535 (N.C.App. 1990), *rev'd on other grounds,* 412 S.E.2d 20 (N.C. 1992); *State v. O'Keefe,* 617 P.2d 938 (Or. App. 1980); *Commonwealth v. Marabel* 283 A.2d 285 (Pa. 1971); *State v. Hohman,* 392 A.2d 935 (Vt. 1978); *State v. Preece,* 383 S.E.2d 815

(W.Va. 1989); *State v. Koput*, 418 N.W.2d 804 (Wis. 1988). *See generally* David M. Nissman, et al., *Law of Confessions* §4.10 at 100 n.53 (1985); J.F. Ghent, Annotation, *supra*, § 6.

Clearly, this is the test which has gained the widest approval among the courts. Although a subjective test is supported by considerable logic,[12] the objective is more susceptible of proof. As in many other areas of law, courts have found the workings of an individual mind are too complex to enable the use of a truly subjective standard. Jefferson v. Smith, *The Threshold Question in Applying* Miranda: *What Constitutes Custodial Interrogation*, 25 S.C. L. Rev. 699, 713 (1974). Under these conditions, courts have adopted a standard which at least approximates the proper result in the normal case, and one which can be proven with relative accuracy. *Id.* The objective standard is a reasonable solution to the problem. *Id.*

Contrary to Petitioner's argument, then, there is no "widespread confusion" among the lower courts, including Colorado, concerning when the requirements of *Miranda* are applicable. To the contrary, nearly all the Federal Circuit Courts of Appeal, and many state courts, including Colorado, apply the objective, reasonable person test first set forth in *Berkemer* to the determination of "custody" for purposes of

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12. The person who honestly but unreasonably thinks he is under arrest has been subjected to precisely the same custodial pressures as the person whose belief in this regard is reasonable. Wayne R. LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 Mich. L. Rev. 39, 99 (1968).

Miranda. Colorado is thus squarely in the mainstream in this regard. By urging this Court to examine whether "custody" should be evaluated with reference to "restraints of the degree associated with arrest" rather than the parallel language "otherwise deprived of his freedom of action in any significant way," Petitioner seeks to divert this Court away from the more appropriate inquiry of "how a reasonable man in the suspect's position would have understood his situation." *Berkemer*, 468 U.S. at 422. In directing this Court to examine definitional language instead of the substantive test that is employed to effectuate this language, Petitioner disingenuously leads this Court in a direction that will generate, rather than curb, "widespread confusion" in this settled area of criminal law.

C. Petitioner's Proposed Definition of Custody Lacks Guidance and Unduly Limits the Applicability of Miranda Warnings.

Petitioner's argument that the controlling language for determining whether someone is in custody for purposes of *Miranda* is "arrest or restraints to a degree associated with formal arrest" suffers from another flaw. This phraseology tends to collapse the separate concepts of custody and significant deprivations of freedom originally articulated in the *Miranda* decision. *Yeager, supra,* at 15. However, the disjunctive use of the word "or" in *Miranda* demonstrates the Court's intent to create <u>two</u> types of restraint in which questioning by police leading to a confession would be presumed compelled if unattended by warnings and a valid waiver: "[w]hen

an individual is taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 68, *quoting Miranda,* 384 U.S. at 478 (emphasis added). This provision was not inserted into the *Miranda* opinion cavalierly; there are five separate references to the two types of custodial restraint in the majority opinion. *Id.* at 444, 445, 467, 477, 478. Despite this conjunctive construction, the Petitioner, in propounding its test for custody, requires of significant deprivations of freedom the characteristics of something which clearly they are not - settings of custody. *C.f. Yeager, supra,* at 68. Petitioner suggests, in essence, that courts evaluate only whether arrest or its functional equivalent is present. (*See* Pet. for Cert. at 11.) Several problems flow from this proposed shift in analysis.

First, the phrase "restraint on freedom of movement of the degree associated with formal arrest" provides no more guidance than "otherwise deprived of his freedom of action in any significant way." This language does not make *Miranda's* "bright line" any brighter. What is the functional equivalent of arrest? Does it involve a greater degree of compulsion than a reasonable suspect's perception that he or she is not free to go? *Yeager, supra,* at 15-16. Does it require a particular length or degree of restraint or intrusiveness of questioning? *Id.* at 16.

Second, and even more compelling, to reduce "custody" to arrest or its functional equivalent is to blur a distinction designed to establish a class of police-suspect encounters that

would fall short of actual custody but still command *Miranda* warnings. *Id.* [13] This definitional merger unduly limits the circumstances that could qualify as significant deprivations of freedom. *Id.* As a result, coercive police practices that occur in settings that fall short of a formal arrest become legitimized. Such an outcome betrays the intended scope of *Miranda* and its offspring.[14]

D. Petitioner's Suggested Definition of "Custody" for Fifth Amendment Purposes Inappropriately Relies on the Fourth Amendment Concept of "Arrest."

Petitioner argues that the Colorado Court, by alluding to the phrase "not free to leave," equates any "seizure" for Fourth Amendment purposes with "custody" for Fifth Amendment purposes. This was not the intent of the Colorado Court. The lower court simply noted, as one of the many factors that supported its finding of "custody," that Mr. LaFrankie was never informed that he was free to leave. *LaFrankie,* App. to Pet. for Cert. at C-8, C-9. "Whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation" is just one of numerous factors that the Colorado Court considers in making the "custody" assessment.[15] The Court did

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13. *Cf. Berkemer,* 468 U.S. at 436-37 (declining to establish class of restraint that qualifies as seizure for Fourth Amendment purposes but not as significant deprivation for Fifth Amendment purposes.)

14. *See supra,* n.6 and accompanying text.

15. *See supra,* p. 30.

not, in this case,[16] refer to "not free to leave" as utilized for Fourth Amendment purposes, as the standard for determining "custody" for Fifth Amendment purposes.

Moreover, Petitioner's contention that this Court should substitute the *Miranda* definition of custody -- taken into custody or otherwise deprived of his freedom of action in any significant way -- with the language of *Beheler* -- formal arrest or restraint on freedom of movement of the degree associated with formal arrest -- suffers from a pitfall which is the converse of that attributed to the lower court. The proposed definition equates "custody" or its functional equivalent for *Miranda* purposes, a Fifth Amendment determination, with the term "arrest" as it is defined for Fourth Amendment purposes. The logical extension of Petitioner's argument is that persons subjected to many Fourth Amendment detentions could never be in custody for purposes of *Miranda*. Such an analysis fails to recognize a subtle, yet significant distinction between Fourth and Fifth Amendment jurisprudence grounded in the values each constitutional provision advances. *Williamson, supra,* at 386. This distinction is that the determination of "custody" for Fifth Amendment purposes is based on an analysis of compulsion,[17] whereas Fourth Amendment seizures are concerned

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16. *But see People v. Johnson,* 671 P.2d 958, 962-62 (Colo. 1983)

17. In *Miranda,* this Court states that the privilege against self-incrimination is founded on a complex of values. *Miranda,* 384 U.S. at 460. Among them are the respect a government must accord to the dignity and integrity of its citizens, respect for the inviolability of the human personality, and the requirement that the government seeking to punish an individual must produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Id.* (citations omitted).

with deprivation of liberty and privacy interests.

As was stated previously, the element of compulsion is the key to the *Miranda* decision. *Id.* at 387. The Fifth Amendment prohibits the use of any practice or tactic that compels a person to incriminate himself or herself. *Id.* at 388 (emphasis in original). According to *Miranda*, the prohibited element of compulsion is present in all cases of in-custody interrogation. *Id.* *Miranda* therefore proceeds from the assumption that a significant deprivation of freedom of movement, together with police-initiated questioning, necessarily generates a form of prohibited compulsion.[18] *Id.* The suspect's state of mind, real or attributed, provides the factual predicate for the assumption that compulsion exists when a suspect is subjected to custodial questioning. *Id.* at 404.

The Fourth Amendment, alternatively, is based on concerns for deprivation of a suspect's freedom of movement, *Williamson, supra,* at 397, the privacy interests of persons detained, *id.* at 399 n. 116, and concern for personal safety and personal dignity. *Id.* at 403.

The Fifth Amendment concept of custody and the Fourth Amendment concept of detention further, at least in part, compatible interests. Both are premised to varying extents on

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18. Cases decided both before and after *Miranda* have held that other prohibited forms of compulsion, physical or psychological, may occur in addition to those flowing from the fact of in-custody questioning. The fact remains, however, that following *Miranda*, a person in custody necessarily and always, regardless of circumstances, in considered subjected to prohibited compulsion when interrogated, unless first properly warned of his or her constitutional rights. *Williamson, supra,* at 388-89, and authorities cited therein.

the assumption that significant restraints on freedom of movement implicate constitutional values beyond those inherent in the mere loss of that freedom. In the case of the Fifth Amendment, significant custodial restraints produce a form of prohibited compulsion to speak when questioned. In the case of the Fourth Amendment, significant custodial restraints maximize the government's evidence gathering potential. *Id.* at 404.

Although the values that underlie the concepts of custody and arrest are closely aligned, the analogy is not perfect. *Miranda's* concept of custody is predicated upon the belief that significant custodial restraints generate, in the mind of the suspect, a form of prohibited compulsion. *Miranda* makes sense only if, in deciding whether a suspect is in custody, an attempt is made to view the situation as it might appear to a reasonable person. *Id.*

On the other hand, in a Fourth Amendment analysis, where the issue often is whether a suspect was subjected to a *Terry*[19] type detention or instead was arrested, the state of mind of the suspect is not important, given the values that underpin the distinction between the two forms of seizure. The suspect's state of mind is irrelevant to the advancement of legitimate Fourth Amendment values. The Fourth Amendment guarantees freedom of movement and the attendant privacy rights. These guarantees thus operate as a check against unreasonable actions by law enforcement officials. A lawful *Terry* stop is not

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19. *Terry v. Ohio*, 392 U.S. 1 (1968).

rendered unreasonable simply because a "reasonable person" would believe that he or she has been arrested, or because the suspect is uncertain as to his or her fate during the period of the temporary detention. Anxiety simply is not a value recognized by the Fourth Amendment. Similar reasoning applies to the law of searches. A search of our papers, houses, and effects occurs when the police actually invade our privacy; the Fourth Amendment is not violated simply because we believe, perhaps reasonably so, that our houses, papers and effects are about to be searched or seized, or both. *Id.* at 404-405 (emphasis added).

Because the concepts of custody and arrest do not coincide in all respects, one subtle yet potentially outcome-determinative difference between the two must be recognized and implemented. The determination whether a *Terry* stop, because of the circumstances, crossed the threshold and became "custody" for *Miranda* purposes, but not an "arrest" for Fourth Amendment purposes, must be made with reference to the likely perception of a reasonable person. *Id.* at 405.

In his article, Professor Williamson sets forth two examples that illustrate when the divergence between *Miranda's* concept of custody and the Fourth Amendment's concept of arrest could become outcome-determinative. In Case One, upon reasonable suspicion a suspect is detained for a brief period in a manner that otherwise clearly would constitute a detention less than formal arrest, except that the detaining officer informs the suspect that he is under arrest. Although the circumstances might not otherwise dictate such a result, the

fact that the suspect was informed that he was under arrest means that he must be deemed in custody for *Miranda* purposes. The communication of the fact of arrest would have a profound effect on a reasonable person's view of the circumstances of custodial questioning that might follow. *Id.* at 406.

In Case Two, a suspect is detained under circumstances that constitute a valid *Terry* stop. His vehicle is stopped upon reasonable suspicion that it contains contraband. The stop is achieved when a uniformed officer, in a police car, with lights flashing, catches the suspect's speeding vehicle. The officer approaches the vehicle with his handgun drawn and orders the suspect out of the vehicle. The officer further instructs the suspect to assume a "spread eagle" position. Following a *Terry* frisk for weapons, the officer demands the suspect to produce his driver's license and vehicle registration. The driver produces his own valid license and a bill of sale for the vehicle in the name of another. In response to questions concerning the ownership of the vehicle, the suspect answers that it belongs to a friend. The officer advises the suspect that he will be detained until the arrival of a narcotics officer. At that point, the suspect becomes nervous, indicates that he would like to leave, and requests the return of his license. The traffic officer tells the suspect that he is not free to leave. Within fifteen minutes, the narcotics officer arrives and informs the suspect that he believes the vehicle contains contraband. The narcotics officer twice asks the suspect for permission to search the car. Both times, he

declines. The narcotics officer then tests the rear of the vehicle and, when it does not move, concludes that it is overloaded. The officer puts his nose against the trunk and says that he smells marijuana. When the suspect is asked directly whether the vehicle contains marijuana, he responds, "It's not mine. I was just carrying it for a friend." The narcotics officer opens the trunk and discovers a large quantity of marijuana. *Id.* at 406-407.

The facts of Case Two are, essentially, the facts of *United States v. Sharpe,* 470 U.S. 675 (1985), except that in *Sharpe* no questioning of the suspect occurred before the marijuana was discovered. In *Sharpe,* this Court concluded that the suspect was validly detained upon reasonable suspicion until such point as the narcotics officer detected the odor of marijuana. The issue remains whether the questioning of the suspect was permissible in the absence of *Miranda* warnings. *Id.* at 407.

If the issue of custody is determined with reference to the likely state of mind of the suspect, and not with reference to whether he was the subject of a *Terry* stop or a formal arrest, the suspect in Case Two surely would have felt the type of compelling environment described in *Miranda.* He was forcibly detained by two officers. Firearms were displayed, and the suspect was frisked. He was advised that a narcotics officer had been called to the scene and that he was not free to leave. He was detained under these circumstances for fifteen minutes and, upon the arrival of a narcotics officer, was twice asked to consent to a search of the vehicle. Finally, he was

specifically accused of driving a car that the police suspected -- confirmed by the odor -- contained marijuana and asked directly whether the car in fact contained marijuana. A more compelling environment outside *Miranda's* paradigm station house interrogation is difficult to imagine. *Id.*

The foregoing discussion demonstrates the intersection and potential conflict between the *Miranda* decision and Fourth Amendment doctrine. It is analytically expedient to conclude that an individual's freedom of movement is restricted in a "significant way" -- and thus is "in custody" for *Miranda* purposes -- when, but only when, the person is "under arrest." It is likewise convenient to assume that a suspect whose freedom of movement has been restricted only to the extent that the person has been subjected to a Fourth Amendment *Terry* stop has not suffered the type of significant restraints on freedom of movement required by *Miranda*. However, because the Fourth Amendment jurisprudence that defines and differentiates the concepts of stop and arrest is derived from values unrelated to those underlying the *Miranda* decision and the Fifth Amendment, Petitioner's proposed definition of "custody," which is more closely aligned with Fourth Amendment than with Fifth Amendment concepts, fails to adequately address the types of compulsion *Miranda* set out to remedy.

E. The Definity of Custody Propounded by Petitioner Fails to Recognize that Custody and Interrogation Must be Evaluated in Tandem in Determining the Necessity for Miranda Warnings.

Implicit in Petitioner's argument is the notion that a court must evaluate whether a person is in custody for *Miranda* purposes in a vacuum, divorced from any consideration of the interrogation component. The *Miranda* court, however, chose to give definition to the phrase "custodial interrogation," rather than defining "custody" and "interrogation" as discreet concepts. To the extent that subsequent opinions focus on the meaning of either "custody" or "interrogation" taken alone, it is because there is no question that the other component is present. *Perkins,* 110 S.Ct. 2394; *Murphy,* 465 U.S. 420; *Beheler,* 463 U.S. 1121; *Innis,* 446 U.S. 291; *Mathiason,* 429 U.S. 492; *Beckwith,* 425 U.S. 341; *Orozco,* 394 U.S. 324; *Mathis,* 391 U.S. 1.

The Court only recently reaffirmed this notion that custody and interrogation work together to generate inherently compelling pressures. In *Illinois v. Perkins,* 110 S. Ct. 2394 (1990), Justice Kennedy stated that "it is the premise of *Miranda* that the danger of coercion results from the <u>interaction</u> of custody and official interrogation." *Id.* at 2397 (emphasis added). "Questioning by captors, who appear to control the suspect's fate, may create <u>mutually reinforcing</u> pressures that the Court has assumed will weaken the suspect's will ...." *Id.* (emphasis added). In holding that an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response, the Court noted that "[W]hen the agent carries neither badge nor gun and wears not 'police

blue,' but the same 'prison gray' as the suspect, there is no 'interplay between police interrogation and police custody.'" *Id.*, citation omitted (emphasis in original).

That it is the interaction of official questioning in a custodial environment that gives rise to the coercive pressures that *Miranda* addresses is explained as follows: "It is the impact on the suspect's mind of the interplay between police interrogation and police custody - each condition reinforcing the pressures and anxieties produced by the other - that, as the *Miranda* court correctly discerned, makes 'custodial police interrogation' so devastating. It is the suspect's realization that the same persons who have cut him off from the outside world, and have him in their power and control, want him to confess, and are determined to get him to do so, that makes the 'interrogation' more menacing than it would be without the custody and the 'custody' more intimidating than it would be without interrogation." *Yeager, supra,* at 4 n.15 (emphasis in original).

One author has considered the proposition that both the "custodial" and "interrogation" elements must be considered together in determining whether a particular situation gives rise to the need for *Miranda* warnings. *Yeager, supra*. One view of such a melding of the two elements might mean that a high level of interrogation must be considered in evaluating the legal consequences of an otherwise low level of custody, and that a high level of custody should be taken into account in the *Id.* at 49. For example, in a setting where one component is by

itself insufficient to warrant *Miranda* warnings but the other is highly compelling, the higher component may compensate for the "shortcomings" of the component that features a lower degree of compulsion. *Id. Miranda,* then, is required whenever both elements aggregately exert on a suspect a certain level of compulsion, even if one element standing alone is below that threshold. *Id.*

A second view posited by this author is that the Court's allusion to "interplay" may actually have envisioned a synergistic relationship. *Id.* "Synergy" describes how two forces, acting together, create a unified system in which each element acts in a manner unpredicted by the behavior of its parts taken separately. *Id.* at 49-50. Where interplay views each element as merely being added to the other, synergy views each element as augmenting the other. *Id.* at 50. Under either view, police, when imposing a severe level of custodial restraint on a suspect, excite in the suspect a heightened sensitivity to whatever interrogation techniques are used. *Id.* Conversely, a low level of custodial restraint affords police greater leeway in interrogating a suspect before *Miranda* warnings become necessary. *Id.* at 49-50.

If the concepts of "custody" and "interrogation" are viewed separately, as Petitioner's argument assumes, both elements must in each case reach a certain threshold of compulsion before *Miranda* attaches. The difficulty with this approach, however, is that it ignores the fact that it is the <u>interplay</u> of custody and interrogation that subjugates a suspect to the will of his

examiner. *Id.* at 48. When Justice Stewart wrote in *Rhode Island v. Innis*, 446 U.S. 291 (1980), that "'interrogation' ... must reflect a measure of compulsion above and beyond that inherent in custody itself," *id.* at 300, he recognized how "custody" and "interrogation" work together to undermine a suspect's will to resist police pressures. *Yeager, supra*, at 48. It is clear from the *Perkins* decision, discussed earlier in this section, that this Court has recommitted itself to an approach which examines the interaction of "custody" and "interrogation" in assessing whether *Miranda* attached in a particular situation.

III. THE COLORADO COURT APPLIED THE CORRECT LEGAL STANDARD IN SUPPRESSING RESPONDENT'S STATEMENTS TO THE POLICE, AND ITS FINDINGS ARE SUPPORTED BY COMPETENT EVIDENCE.

Under any rational interpretation of the United States Supreme Court's definition, the facts of this case support a finding of "custody." The Colorado Supreme Court found that the district court applied the correct objective reasonable person standard and considered the totality of the circumstances, including the purpose of the interview, the words used by the officers, the setting and duration of the interview, and the fact that Mr. LaFrankie was never informed that he was free to leave the interview room or terminate questioning. The district court's findings were found to be supported by competent evidence. The same result is reached under the analysis regardless of any perceived semantic differences in the definition of "custody."

The trial court cited many factors it found significant in reaching its conclusion. As to time, place and purpose of the encounter, it was done during working hours, in the office of Mr. LaFrankie's boss, (App. at p.18, l.19 through p.20, l.13.), and for the purpose of obtaining a confession. (App. at p.1, l.15 through l.18.) As to the persons present during the interrogation, only two police officers and the defendant were present. (App. at p.5, l.15.) The words spoken by the officer to the defendant included repeated statements to Mr. LaFrankie indicating that he was lying, (App. at p.23, l.13-17.), that the officers were trained to discern this, that he would flunk the polygraph test the officers would be administering, (App. at p.31, l.3-7.), that he would feel better telling the truth and that the judge would treat him better if he told the truth. (App. at p.28, l.6-25) The officers' tone of voice and general demeanor were characterized by the lower court as low-key and without threats, yet accusatorial. The length of the interrogation was about thirty minutes, (App. at p.10, l.18.), and the mood was accusatorial from the start and throughout the interview. (App. at p.24, l.1 through p.26, l.14.)

Relevant to whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation is that Mr. LaFrankie was removed from his personal work site by his employer, acting at the request of the police, and taken to the office of his boss where the door was closed behind him. (App. at p.128, l.19 through p.20, l.13.) Two police officers sat in close proximity to him, (App. at p.21,

l.15 through p.22, l.20.), and Mr. LaFrankie was never told he was free to leave or free to refuse to answer questions. (App. at p.23, l.20.) The trial court enunciated all of these facts as circumstances it considered in arriving at the conclusion that there was custody.

Petitioner argues that "this Court has repeatedly stated that custody requires significant restraints, which are to be measured in terms of the police domination associated with arrest." (Pet. for Cert. at 8). Even if one can discern a difference between "significant restraints" and "being deprived of liberty in a significant way," an examination of the factors discussed above illustrates that Mr. LaFrankie was placed in the type of incommunicado, police-dominated environment envisioned by *Miranda*.

The police domination of this situation could have been significantly reduced by any words or actions on their part which would have communicated to Mr. LaFrankie that he had some rights or some choices in this scenario. The officers never told Mr. LaFrankie that he was free to leave. There were no breaks in the interrogation. Mr. LaFrankie was obviously experiencing anxiety during this lengthy interview. (App. at p.10, l.22 through p.11, l.1.) But he was not given the opportunity to talk to anyone, to leave the room, or to have time alone to think about what was happening. Mr. LaFrankie was never given even a cursory advisement or hint that he had the right not to answer these questions. Instead, the tone was highly accusatorial, confrontational and disbelieving

throughout. When Detective Scott said, "Don't blow smoke at me, cause I'm going to find out, okay," (App. at p.26, l.8) the message conveyed was that the officers would stay and continue their interrogation until a confession was obtained. The message was also that Mr. LaFrankie was going nowhere.

Although a full analysis of numerous factors is critical, one important feature in this case cannot be understated: the fact that the interview took place at Mr. LaFrankie's place of employment, in the president's office. While his place of employment was arguably familiar with Mr. LaFrankie, here it was also the scene or the crime, and the employer was the victim of that crime. The Colorado Supreme Court noted the following about this aspect of the case:

> Although the interrogation by Officers Scott and Goeke did not take place at the station house, there can be few places more intimidating or potentially coercive to an individual than one's place of employment. This is especially true when the employee is first confronted in the presence of senior management, escorted to the president's office, interviewed while the door is closed, and never informed that he is free to leave. *See, e.g., United States v. Carter,* 884 F.2d 368 (8th Cir. 1989)(holding that a bank employee questioned by police in bank president's office was subjected to custodial interrogation); *United States v. Nash,* 563 F.2d 1166 (5th Cir. 1977)(finding custodial interrogation where suspect was taken to security office at his place of employment by his supervisor, interrogated by an FBI agent for 45 minutes with the office door closed, and was not informed that he had the right to leave the office); *United States v. Phelps,* 443 F.2d 246 (5th Cir. 1971)(interrogation custodial where police questioned suspect at his place of business); **cf.** *United States v. Dockery,* 736 F.2d 1232 (8th Cir. 1984)(police questioning of defendant at place of employment not custodial where defendant initiated interview and was told that she did not have to answer any questions, that she was not under arrest, and that she was free to leave at any time).

LaFrankie, App. to Pet. for Cert. at C-8, n.9.

The cases relied on by the prosecution provide a factual point of departure from this case. The *Berkemer* decision makes it clear that, although certain facts can turn a roadside stop does not rise to the level of "custody" - the roadside stop does not rise to the level of "custody" - the encounter is hardly incommunicado and police domination is low. In the *Beheler* case, the defendant himself initiated contact with the police by calling and reporting a crime, the police were invited to his home, he came voluntarily to the police station, and was told he was not under arrest. The *Murphy* case involved a request to the defendant to visit his probation officer, part of his regular routine as required by his status of being on probation. All of these cases turn on a common-sense determination of a reasonable person's perceptions of their relative power and freedom vis-a-vis the police.

In none of these cases was there a surprising interruption of normal life, initiated by the police, in which the suspect was thrust into a private interrogation, without any notification of the right not to be subjected to such interrogation. The difference is well stated by the trial court in this case, as follows:

> "I mean there needs to be a time when a person is advised of their rights. You don't need to do it when you are investigating and you are asking questions and you are trying to figure out what is going on. You don't need to do it if the person can walk away from you and the objective test is whether the person can figure that out."

LaFrankie, App. to Pet. for Cert. at C-10. The type of lengthy,

closed door questioning that occurred in this case is not the limited, investigative inquiry contemplated in the *Berkemer* decision. On the facts of this case, a reasonable person would not be expected to figure out that he was free to leave, unlike the defendants in *Beheler* and *Murphy*.

Further, no policy reasons exist to support the type of police work in this case. Police are free to ask tough questions and interrogate in a confrontative fashion as long as people are aware of the freedom to choose - the choice to leave if free to leave, or the choice to decline questioning if not free to leave. This balances the power between private citizens and the police. Close calls on the issue of "custody" should encourage officers to give the advisement of rights. To hold otherwise would invite deception and abuse. Petitioner argues that some formal event such as the use of physical force or demonstration of authority must occur before a situation is deemed "custodial" for Fifth Amendment purposes. This ignores the more subtle forms of coercion which lie within the power of the police and which were illustrated in this case. According to Petitioner's argument, a police officer would be permitted to lure an unsuspecting person into a private, police-dominated environment and relentlessly accuse and question him without limitation, and, so long as no declaration of arrest, drawing of guns, or physical subduing occurred, the person would not need to be told they have any rights or freedoms. This does nothing to further the goal that statements be the product of an <u>intelligent</u> exercise of the privilege against

self-incrimination.

CONCLUSION

The definition of custody for purposes of *Miranda* propounded by Petitioner was not pressed or passed on in the Colorado courts. Therefore, this Court should refuse to exercise its jurisdiction in this case.

Moreover, the Colorado Supreme Court correctly applied the appropriate legal standard -- the "reasonable person" test, announced by this Court in *Berkemer* -- in making its determination that Mr. LaFrankie was subjected to "custodial" interrogation and therefore should have had the benefit of *Miranda* warnings. Because the Colorado Court's decision conforms with principles previously articulated by this Court, and because its decision is supported by competent evidence, the State's petition for writ of certiorari should be denied.

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_____
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CERTIFICATE OF SERVICE

I hereby certify that on _____, I served the foregoing document by mailing same through U.S. Mail to opposing counsel Bill Nagel, Boulder District Attorney's Office.

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